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Department of the Treasury
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Person To Contact:

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Date:

March 03, 2011

Date 1 =
Taxpayer =
Date 2 =
Attorney 1 =
Accountant =
Attorney 2 =

Dear :

This letter responds to your representative's letter dated September 2, 2010, requesting an extension of time under § 2642(g) of the Internal Revenue Code (Code) and § 301.9100-3 of the Procedure and Administration Regulations to make an election under § 2632(c)(5).

FACTS

On Date 1, a date prior to December 31, 2000, Taxpayer established an irrevocable trust (Trust), which was a grantor retained annuity trust and funded it with stock. At the end of the annuity period on Date 2, a date after December 31, 2000, Taxpayer's retained interest in Trust terminated and the assets of Trust passed to a separate Trust for the benefit of Taxpayer's spouse and then-living descendants. On Date 2, the estate tax inclusion period (ETIP) with respect to Taxpayer's transfer to Trust closed for generation-skipping transfer (GST) tax purposes.

Taxpayer retained Attorney 1 to draft Trust. Taxpayer retained Accountant to prepare the Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) to report the Date 1 transfer.

In 2001, Congress amended § 2632 of the Code in the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub.L.No. 107-16 (2001 Act). Section 2632(c) was amended to provide, in part, a definition of a "GST trust," a rule providing for the

automatic allocation of a transferor's GST exemption to transfers made to a GST trust, and a rule allowing a transferor to elect out of the aforementioned automatic allocation rule. The 2001 Act is effective for transfers made to a GST Trust occurring after December 31, 2000.

Although Taxpayer, Attorney 1, and Accountant state that Taxpayer never intended to allocate Taxpayer's GST exemption to Trust, Taxpayer's remaining GST exemption was automatically allocated upon the termination of the ETIP because of the inadvertent failure to elect out of the automatic allocation rules in § 2632(c), as amended. Several years later, Attorney 2 was retained by Taxpayer to assist in new estate planning and tax matters and Attorney 2 discovered that Taxpayer's GST exemption had been automatically allocated to Trust at the close of the ETIP.

Taxpayer requests an extension of time under § 301.9100-3 to make an election under § 2632(c)(5) to have the automatic allocation rules contained in § 2632(c)(1) not apply to the property of Trust upon the termination of the ETIP.

LAW & ANALYSIS

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means with respect to any GST transfer, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in § 2642(a)(2) is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to

extensions), regardless of whether such a return is required to be filed.

Section 2632(c) is effective for transfers subject to chapter 11 or 12 made after December 31, 2000. See Pub.L.No. 107-16, § 561(a). Section 2632(c)(1) provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(c)(3)(A) provides that for purposes of § 2632(c), the term indirect skip means any transfer of property (other than a direct skip) subject to the tax imposed by chapter 12 to a GST trust.

Section 2632(c)(5)(A)(i)(I) provides that an individual may elect to have § 2632(c)(1) not apply to an indirect skip. Such an election shall be deemed to be timely if made on a timely filed gift tax return for the calendar year in which the transfer was made or deemed to have been made pursuant to § 2632(c)(4) or on such later date or dates as may be prescribed by the Secretary.

Section 26.2632-1(b)(2)(iii)(A) of the Generation-Skipping Transfer Tax Regulations provides that a transferor may prevent the automatic allocation of GST exemption (elect out) with respect to: (1) one or more prior-year transfers subject to § 2642(f) (regarding ETIPs) made by the transferor to a specified trust or trusts; (2) one or more (or all) current-year transfers made by the transferor to a specified trust or trusts; (3) one or more (or all) future transfers made by the transferor to a specified trust or trusts; and (4) all future transfers made by the transferor to all trusts (whether or not in existence at the time of the election out).

Section 26.2632-1(b)(2)(iii)(B) provides that to elect out, the transferor must attach an election out statement to a Form 709 filed within the time period provided in § 26.2632-1(b)(2)(iii)(C). In general, the election out statement must identify the trust, and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Prior-year transfers that are subject to § 2642(f), and to which the election out is to apply, must be specifically described or otherwise identified in the election out statement. Under § 26.2632-1(b)(2)(iii)(C), to elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing the Form 709 for the calendar year in which: (1) for a transfer subject to § 2642(f), the ETIP closes; or (2) for all other elections out, the first transfer to be covered by the election out was made.

Section 2642(g)(1)(A) provides, generally, that the Secretary shall, by regulation, prescribe such circumstances and procedures under which extensions of time will be

granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). In accordance with § 2642(g)(1)(B) and Notice 2001-50, 2001-2 C.B. 189, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or to advise the taxpayer to make, the election.

Based on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Taxpayer is granted an extension of time of 120 days from the date of this letter to elect out of the automatic allocation rules with respect to Taxpayer's transfer to Trust.

Taxpayer's election under § 2632(c)(5) to have the automatic allocation rules contained in § 2632(c)(1) not apply with respect to Taxpayer's transfer to Trust should be made on a Form 709 for the year in which the ETIP terminated. The Form 709 should be filed with the Internal Revenue Service Center in Cincinnati. A copy of this

letter should be forwarded to the Internal Revenue Service, Cincinnati Service Center — Stop 82, Cincinnati, OH 45999, for association with the Form 709.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Leslie Finlow
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)